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LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN CONSTRUCTION OF LINES.

How far telegraph companies have been held liable for negligence and failure in the transmission of messages, has already been determined by numerous decisions.[1] How far their liability extends for injuries resulting from negligence in the construction of their posts or wires has not been fully settled; owing to the paucity of decisions upon the subject, it would be difficult to formulate a rule as to the extent of their liability. Depending mainly upon questions of fact, it has been left to juries to determine, and they have generally awarded a good measure of damages.

So far as it may be obtained from adjudicated cases, the law may be laid down that, where telegraph companies allow their instruments to extend across a public way in such a manner as to obstruct public travel, it is evidence *prima facie* on their part of neglect, and that it is not contributory negligence on the part of plaintiff if, notwithstanding the obstruction, he proceeds along the road and is injured thereby, provided he has exercised reasonable care in attempting to avoid it, even though he has foreseen the obstruction. In one case [2] the plaintiff was a passenger on a stage running between two towns. On arriving at the place of destination, the stage turned off, in the ordinary course of business, from the usual traveled path of the highway. A telegraph wire of the defendant, hanging too low, caught the upper part of the stage, and was the cause of its being upset, whereby plaintiff was damaged. The charter authorized the company to locate and construct its lines along and upon any highway * * * * by the erection of necessary fixtures, etc., "but the same shall not be so constructed as to incommode the public use of said road or highway." The court said: "It is clear that the company could not legally erect posts only a foot in height, and extend the wires at that distance from the ground on the exterior limits and outside of the traveled path, if, by so doing, the use of the highway was obstructed, or rendered inconvenient, or dangerous, or the traveler incommoded. If any injury should arise to any such legal traveler by such erection, he using due care, the company would be liable to him. The same rule will apply when, after erections properly made, they suffer the same to fall down, or to be out of repair, and to remain so after reasonable notice, so as to obstruct the traveler and endanger his safety." In another case,[3] an action was brought for injuries suffered by two horses, drawing a wagon which plaintiff was driving on a public way, by reason of one of the hind wheels of the wagon becoming entangled with one of the defendant's wires swinging across the road. It was urged on the trial that plaintiff was guilty of contributory negligence. He had dismounted from the wagon, and having moved the forward wheels over the wire, remounted, and attempted to drive the horses, when the accident occurred. Hoar, J., said: "This case was taken from the jury upon the ground that there was no sufficient evidence to maintain the action, and has been argued for defendants upon two points:—that there was no evidence of negligence on the part of the telegraph company, and that the evidence had no tendency to show that plaintiff was himself in the exercise of due care at the time of the accident. We think it somewhat doubtful whether the first point is open upon the bill of exceptions, and the presiding judge may have only intended to rule upon the question of care used by plaintiff. But this is not important, because the fact that the telegraph wire is found swinging across a public way is, in itself, unexplained and unaccounted for, evidence of neglect on the part of the company to keep it in a proper and safe condition, and should have been submitted to the jury. The other point is more doubtful; but, upon careful examination, we think it would have been

[1] 4 Am. L. R. (N. S.) 193; Id. 14 (N. S.) 401; Young v. West. Union Tel. Co., 65 N. Y. 163; Bank of New Orleans v. Same, 27 La. Ann. 49; First Nat. Bank v. Same, 30 Ohio St. 555; Logan v. Same, 84 Ill. 468; Sprague v. Same, 6 Daly (N. Y.) 200; Western Union Tel. Co. v. Fontaine, 58 Ga. 433.

[2] Dickey v. Maine Tel. Co., 46 Maine, 483.

[3] Thomas v. Western Union Tel. Co., 100 Mass. 156.

proper to submit that, too, to the jury. If a party, with full knowledge of the existence of the obstruction in a highway, wilfully, or maliciously, or recklessly, keeps on, and involves himself in danger which he had no reasonable cause to believe that he could successfully encounter, he acts at his own risk, and must take the consequences; but because there is an obstacle to proceeding, it does not follow that it is not consistent with reasonable care to attempt to proceed." And the court cited as instances a case [4] where it was held that if a road was obstructed with snow, and the plaintiff knew it was dangerous or impassable, but persisted in going on, he could not recover; but that if he knew it was obstructed, but not so as to indicate to him that he could not pass with safety, and met with injury in proceeding with due care, he might maintain his action; and another case, [5] where it was laid down that if a traveler, being brought into imminent peril by his near approach to a defect in the highway, but in the exercise of due care and prudence leaped from his carriage to avoid it and was injured, he could recover compensation from the town, though he would have escaped injury if he had remained in the carriage, and concluded with the remark that the question in any case was not whether the traveler knew of the defect, and might possibly have stopped to avoid it, but whether he had reasonable cause to think that he might escape from it by means which he adopted, and used reasonable care in making the attempt.

So in a case [6] where a wire was stretched at a height of eighteen inches above the level of the street, and allowed by defendant's company to remain in that position for one hour, and plaintiff riding along on horseback was thrown from his horse and injured, it was held that the plaintiff's right to recover was not affected by his having contributed to his injury, unless he was in fault in doing so, and that the act of the company in permitting its wire to remain suspended across a street in a manner to obstruct travel, without guards, flags, or other notice to the public, was gross negligence. "I think the true rule," said the court, "is and should be that if the plaintiff exercises reasonable care, though he may have been guilty of negligence or want of caution, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence. To defeat his action, he should not only contribute to his injury, but he must be in fault in so doing. If his share in the transaction be innocent and not faulty, it should furnish no excuse for defendant." The court further held that plaintiff could recover damages, not only for actual loss of time during his confinement or disability, but exemplary damages proportioned to the extent of his injury.

While it has been held that telegraph companies are not common carriers [7] in respect to the transmission of messages, it has been decided that they are not responsible for injuries resulting from unforeseen accidents, such as are occasioned by the act of God; and where a telegraph pole was broken by a storm, injuring the plaintiff, the company was held not liable. [8] The court said that the company was bound to use reasonable care in the construction and maintenance of its line, and if it appeared that the post was originally not reasonably sufficient, or carelessly permitted to become insufficient by decay, then responsibility attached. But the company was not absolutely bound to have its posts in the streets so strong and secure that they could not be blown down or broken by any storm, nor bound to insure the safety of passengers in the streets from injuries resulting from the falling thereof. The evidence showed that the accident was occasioned by a snow-storm of unusual severity, and that the line was sufficient for storms reasonably expected; and the charge that defendant was not bound so to make or manage its line as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected, which the lower court refused to give, was affirmed as correct.

While the statutes and special acts of incorporation have conferred upon telegraph companies authority to construct their lines along the public highways, it is seen that it has not relieved them from responsibility for injuries occasioned by their negligent acts; and

[4] Horton v. Ipswich, 12 Cush. 488.
[5] Lund v. Tyngsboro, 11 Cush. 563.
[6] Western Union Tel. Co. v. Eyser, 2 Col. 141.

[7] Lawson's Contracts of Carriers.
Ward v. Atlantic, etc. Tel. Co., 71 N. Y. 81.

in large cities where numerous lines are continually in process of erection or repair, accidents may frequently occur for which the companies should be made to respond in damages upon a proper showing of the facts. In the progress of modern improvement, when private convenience must yield to public necessity, it is important that the division line between private and public rights should be distinctly defined. When horse railroads were first constructed in New York City, property holders, along whose streets the rails were laid, complained of unprecedented invasions of private rights. They alleged that they owned the land in fee to the middle of the street upon each side, subject of course to the public easement; that there was a material difference in the use of this easement by street car companies and ordinary vehicles; and upon the principles laid down in an important case bearing upon the question,[9] they contended that such an appropriation of a highway by a railroad company was an imposition of an additional burden upon and a taking of the property of the owner of the fee within the meaning of the constitutional provision which forbade such taking without compensation. But it was fully demonstrated in a subsequent case[10] after considerable litigation, by the New York Court of Appeals, that the fee of the streets, acquired by the City of New York, was held by it in trust for the use of all the people of the State, and not as corporate or municipal property; that it was under the unqualified control of the legislature, and any appropriation of it to public use by legislative authority was not a taking of private property so as to require compensation to the city to render it constitutional. "A case," says Judge Redfield, "which must be regarded as settling the law in this State, (New York), notwithstanding some conflict in the decisions of their different Supreme Courts." The rule is thus laid down by Judge Emott: "It must be regarded as settled in the jurisprudence of this State, that the appropriation of property to the construction or use of a railway for the transportation of passengers is an application of such property to the use of the public. The doctrine applies to all railways whether traversing the State or the streets of a city, and of course the motive power used does not affect the question."

It can scarcely be apprehended that the use of the public streets by telegraph companies will meet with the same opposition on the part of private property owners, as the use by the street railroad companies formerly did. The inconvenience to which they may be subjected is not so great in the former case, and inasmuch as the question has been pretty well settled in the different States so far as street railroad companies are concerned, it will not perhaps be likely to recur again. Until private property is actually invaded, telegraph companies, it is believed, will not be disturbed in their appropriations of public highways and streets, for the construction of their lines, so far as it is consistent with statutory authority. Should they see fit to lay their posts on and stretch their wires over private property in such a manner as the telephone companies, in many cities, have unwarrantably done, they would be compelled to take them down again independent of any statute prohibiting it, since the proprietorship of land extends *usque ad cœlum* as well as *usque ad mediam terram*.

[9] Williams v. New York Cent. R. Co., 16 N. Y. 97.
[10] People v. Kerr, 27 N. Y. 188.

MASTER AND SERVANT.

The proposed alteration of the English law as to the liability of the master for injuries to his servants, has called forth the following protest from Baron Bramwell of the English Court of Exchequer, which we believe will be read with interest on this side of the water, as a clear statement of the principles upon which the present law rests, as well as a powerful piece of reasoning by a great judge in behalf of the law on the subject as it is now administered in nearly all the States of the Union.

"When a new law is proposed," says Baron Bramwell, "it may seem to some of little consequence what is the old law, or the reason for it. The only question, it may be said, is, Will the new law be good? I should not think so. Those who propose to make a law, in truth propose to alter what exists, and should give a good reason for the change in all cases. But most certainly should they do so when the new law is proposed on account of some alleged hardship or anomaly in the old law.

"This is the case in the proposed alteration of the law as to the liability of employers for negligence of a servant causing damage to a fellow-servant. It is said that the existing law is anomalous, and that it is an exception to the general

rule that makes employers liable for the negligence of their servants, a grievance to workmen, and a grievance without justification. It is somehow supposed that, as a matter of natural right, something that exists in the nature of things, employers are liable for injuries occasioned by their servants' negligence, and that to except fellow-servants from this rule is unjust and unreasonable.

"Now, this is an entire mistake; and it is really wonderful how not only those who are not lawyers, but lawyers who ought to know better, are under the impression I have mentioned. It becomes necessary to begin at the beginning, and state some entirely elementary rules of law.

"The primary rule is that a man is liable for his own acts, and not for those of others. A man, as a rule, is no more liable for the wrongs done by another than he is for his debts. The cases in which he is liable are exceptions to the rule, and not the rule. I will proceed to state the exceptions.

"1. When a man undertakes to do or perform any work, he undertakes that it shall be done or performed with reasonable care or skill. If he does or performs it himself, and is negligent or unskilful, and damage results, he is liable. So he is if he does or performs it not himself, but by agent or deputy. For instance, if a smith's servant, in shoeing a horse, hurts it by negligence, the master is liable; so would he be if he got a neighboring smith to shoe the horse, and he injured the horse by his negligence. So a railway company that undertakes to carry a passenger from A. to B. is liable for damage occasioned to the passenger by the negligence of its servants; so, also, is it liable if the damage was occasioned beyond its own line, by the negligence of the servants of another company who were the agents of the first company for the completion of the journey. For example, if the contract of carriage was from London to Inverness, and part of the journey was in the carriages and with the servants of a Scotch railway company, the first company would be liable on their contract that due care should be used throughout. In these cases no question of master and servant arises; the question is one of contract. He has contracted that a certain thing shall be done in a certain way; he has not done it according to his contract, either by himself or his deputy. The reason of this liability is obvious. The parties have contracted for care. In this case the servant or agent is not liable.

"2. The next case in which a man is liable for the act of another which causes injury is where he has caused or commanded that act. If A orders or procures B to beat C, A is as much liable to C as though he, A. had given all the blows. So if a man employs a builder to build a house of such a size, and in such a place, that, when built, it will obscure his neighbor's lights, he is as much liable as though he built the house with his own hands. This class of cases also has nothing to do with the relation of master and servant. The employer is equally liable whether the person who did the act complained of was his servant, or his agent, and not his servant. In this case the actual doer of the act—viz., the builder who built the house, the man who actually did the wrong—would also be liable. The reason of this rule is obvious. The wrong has been done by him who procured it as much as by the actual doer, and the maxim *qui facit per alium facit per se* applies.

"3. There is a third class of cases in which a man is liable for the act of another. If a servant—acting within the scope of his authority—by negligence injures one of the outside world (an expression I will explain presently), his master is liable. It will be observed that four things are necessary to constitute this liability. First, the actual doer of the mischief must be a servant of the person sought to be made liable. It is not enough he is employed, if not as a servant. If I employ my servant to pull down a wall, and, by his negligence, he injures a passer-by, I am liable. If I employ a firm of builders to do it, I am not liable. The same thing is true if I employ a working bricklayer. I do not know that it is necessary to define or describe a servant. Shortly, the relation of master and servant exists where the master can not only order the work, but how it shall be done. When the person to do the work may do it as he pleases, then such a person is not a servant. Next, the servant must be acting within the scope of his employment. If my coachman takes my carriage and horses to give his wife a ride, and is guilty of negligence causing damage, I am not liable. Next, the damage to be recoverable against the master must be the result of negligence. If caused wilfully, the master is not liable. If my coachman wilfully drives against anyone or his carriage, I am not liable for the damage resulting. Lastly, the person injured, to have any remedy, must be one I have called of the outside world. The master is not liable to any one with whom he has entered into some relation, unless such liability was one of the terms of that relation. Thus, if my servant drives over a stranger, I am liable. If my friend is having a drive with me, and is injured by my servant's negligent driving, I am not liable, because it is not one of the terms of our relation. If the passenger had paid me money to carry him, I should be liable under the first head of liability, because I had contracted with him that he should be driven with care. If my servant leaves a stumbling block in the street, in the course of his work, and anybody falls over it, I am liable. If he leaves a trap-door open in my house, and my guest falls through, I am not liable. The reason why I am not liable in the cases in which I am not, is the general one I started with—viz., a man, as a rule, is not liable for the acts of others. But why is the master liable in the case in which he is—viz., to the outsider? Many reasons have been suggested. It has been said he is liable because he has given the wrongdoer the means of doing the mischief. But that is not so. For if the act is wilful, the master is not liable, though the means of mischief are the same. Nor is a man liable who lends his carriage to a friend, however unskilful, who drives over and damages a third person. Then it is said the

master is liable under the second head of exception I have mentioned—viz., *qui facit per alium facit per se*. But that is not true. Because the negligence, the wrongful act, may be contrary to the master's express orders. I tell my servant never to drive in at a gate with "out" on it. He does and causes damage; I am liable. He drives without a lamp, contrary to my orders; I am liable if damage ensues. Another reason, ironically given, but which has great practical effect, is that the master is liable because he is a competent paymaster, while the servant usually is not. There is another reason which exists in fact; whether good or bad is another matter. A man is walking on the Queen's highway, and is run over by my servant. He may say, with some color of fairness, 'I was doing what I had a right to do. I was injured by your servant. I had no voice in the choice of him. I could only keep out of the risk of injury from him by foregoing my right to walk in the public streets. Therefore, to make you and other masters careful in the choice of servants to whom you give the means of mischief, you and other masters must compensate for that mischief when it happens.' Now, I do not say that is a sufficient reason, but it is the only one I know of, and it is not a reason applicable to the case of one servant injuring another, for then each servant has a voice in the matter. The master hiring a servant says, 'Here is your work, here are your fellow-servants; work for me or not, as you please.' The servant may say, 'I do not please so long as so-and-so is in your service, for he is negligent.'

"There is, then, no general rule which makes one man liable for the negligence of another. The general rule is the other way. There are exceptions. The case of one servant injuring another is not within these exceptions, nor the reason of them, but the contrary. It has been said that the servant contracts himself out of the right of compensation. It would be better to say he does not contract himself into it. He can, if he and his master agree. Nay, he can stipulate for compensation where there is no negligence. He does not contract that his case shall be an exception to the general rule that a man is not liable for the acts of another. There is no injustice in this. There is in the proposition the other way. For no one can doubt that the dangers of an employment are taken into account in its wages. No one can doubt that the unpleasantness and risk of a miner's work add to his wages. Put sixpence out of his daily wages of five shillings as being on account of that risk—a sum which he may save or use as a premium of insurance. What is the proposal of those who would make the employer liable but this, that the servant shall keep the premium in his own pocket, and yet treat his master as the insurer? I do not believe that this is understood, or it would not be asked for; but it is the truth.

"So much for the existing law, and so much for the reason of it. Now for the proposed change and the reason of it.

"The largest proposed change is that the master should be liable to his servant for the negligence of a fellow-servant. Why? I have shown that the supposed grievance does not exist. That it is not a natural right that the master should be liable, nor anything that exists in the nature of things. That it is reasonable a railway company should be liable to a passenger for the negligence of its servants, because it has so contracted; and that it should not be to one of its own servants, because it has not so contracted. We are to start afresh, then, and make a new rule. Why? Why if I have two servants, A and B, and A injures B, and B injures A by negligence, should I be liable to both when, if each had injured himself, I should not be to either? There can be but one reason for it, viz.: that, on the whole, looking at the interest of the public, the master, and the servants, it would be a better state of things than exists at present. Is that so? Now, we must start with this, that it is under the present law competent for a servant to stipulate with his master that the master shall be liable for the negligence of a fellow-servant, or in respect of any hurt or injury the servant may receive in the service. So that the difference in the law, if changed as proposed, would be this. At present the master is not liable, unless he agrees to be; on the change he would be unless he and the servant agreed he should not be. For I suppose it is not intended to forbid the master and servant contracting themselves out of the law. That is to say, if a man prefers to take 5s. a day and no liability for accidents, rather than 4s. 6d., and the master prefers the former terms, it is not, as I understand, proposed to prevent their entering into a binding agreement to that effect. That would be a most mischievous interference with the freedom of contract, and would give rise to gross injustice and fraud on the master. I can not suppose anything so outrageous, and proceed to consider what will follow if the liability is optional, but to exist where the parties have not agreed to the contrary. Every prudent employer of labor will immediately draw up a form to be signed by his workmen that the master shall not be liable for a fellow-servant's negligence. Or he will hire men somewhat on these terms: '5s. a day, and no liability; 4. 6d., and liability, and I will either compensate you myself, or apply the 6d. to an insurance for you.' I have put 6d., but I believe the difference of a farthing would make the men choose no liability. The present claim for liability, I repeat, arises from the workman not appreciating that he receives the premium now, yet would make the master the insurer.

"The great employers of labor will understand the change in the law and guard against it. The mischief and wrong will be in the case of men who, not knowing of the change, will go on paying the wages which include the compensation for risk, the premium of insurance, and yet find they have to pay compensation when the risk happens, and that they are insurers though they have not received the premium.

"What good will the new law do? None to the workman, except in such cases as I have last men-

tioned — cases of surprise and injustice. For, where it is known, it will be guarded against. And even if the law were made obligatory in spite of bargains to the contrary, it would not profit the servant. Because it is certain there is a natural rate of wages, one fixed by what neither master nor man can control, and that if they are practically added to one way, they will be taken from in another. If a manufacturer's wages now are £10,000 in the year, and he is made to pay compensation to the amount of £1,000 a year, his wages will fall to £9,000. He can not charge more for his produce because he has to pay more; and if he could, his sales would diminish, and injury be done to the workman in loss of time.

"What good, then, will the change do? The only thing I have ever heard suggested is that it will make the master more careful in the choice of his servants. I suppose it would. For it would not have an opposite tendency. But is it just or reasonable that for this small good masters should be made liable to the extent intended; that, to prevent one accident through careless hiring of an incompetent fellow-workman, the master should pay a thousand compensations where he has done his best to get careful men? Is he not under sufficient inducements to be careful already? How rarely does an accident happen to the workman without mischief to the master, and without an appeal to his charity? Further, I ask, would the workmen like that system which has prevailed in some employments, and to which the masters would be obliged to have recourse, viz.: not employing a workman unless he produced a certificate of competency and fitness from his former employer? Still further. If some good would be done in this way, would there not be more mischief in another? Everyone knows the recklessness bred by familiarity with danger. The man who would not open his lamp in a mine at first, will do so after a time. Another thing. It is a respectable feeling, though mistaken, which prevents servants from doing what they call "split" on each other, the consequence being that negligence, leading to danger, by one workman, is concealed from the master by the others. Now, I do not say that workmen will injure themselves for the sake of compensation; but I do say that whatever tends to lessen their reason for care and good conduct, as compensation would, tends to make them less careful in themselves, and more disposed to conceal want of care in others.

"I say, then, that the proposal to make the master liable to a servant for the negligence of a fellow-servant is contrary to principle, unjust, unreasonable, and calculated to produce, if not no good, at least more harm than good. It would be better to make servants liable to their masters for the damage caused by their fellows, than to make masters liable to them as proposed.

"One word as to the Government Bill. Its provisions are needless or wrong. If the master, by an act of omission, fails in his duty to a servant, he is liable, whether the failure was in himself personally, in his manager, or other agent. *If* the injury arises from an act of commission, then the reasoning I have used is applicable. Let the actual wrongdoer be responsible. No servant is bound to obey a command attended with danger.

"One word more. It is proposed to guard the master by provisions that he shall not be liable if the servant contributed to the injury. There are other qualifications. In vain. The untruths told in accident cases are prodigious. They will be told in such as the bill will give rise to. I foresee a frightful crop of litigation if it passes."

ATTORNEY AND CLIENT—ATTORNEY ACTING FOR ADVERSE INTERESTS—FRAUD.

BAKER v. HUMPHREY.

Supreme Court of the United States, October Term, 1879.

1. An attorney can not in any case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.

2. B, who had agreed to sell lands to which he claimed title, to H & S for $8,000, employed W, an attorney, who had long been employed by him to do legal business, to draw the contract of sale, which W did, and witnessed its execution. H & S then employed W to examine the title. In doing this W found that the title was apparently in C, though C had never asserted it. W, for a consideration of $25, represented that he wished it to protect the title of clients, procured a conveyance of the lands to his brother from C. The brother was not cognizant of this transaction. Thereafter W instituted an action of ejectment in his brother's name to recover the lands. In an action by B to have the deed to the brother of W declared fraudulent, etc.: *Held*, that the relation of client and counsel subsisted between B and W, and the conveyance from C to the brother inured to the benefit of B.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Mr. Justice SWAYNE delivered the opinion of the court:

This is an appeal in equity. A brief statement of the case, as made by the bill, will be sufficient for the purposes of this opinion.

On the 27th of February, 1851, one William Scott conveyed the premises in controversy to Bela Chapman, taking from him a mortgage for the amount of the purchase-money, which was $3,500. Both the deed and mortgage were properly recorded. Chapman did not take possession of the premises. On the 29th of November, 1851, Scott assigned the mortgage to Jacob Sammons. The assignment was duly recorded on the 19th of March, 1852. Sammons conveyed the premises with warranty to Wm. M. Belote. From him there is a regular sequence of conveyances down to the complainant, Baker. Chapman lived near the property for years and knew that Sammons and others were in adverse possession and claim-

ed title, but never claimed or intimated that he had any title himself. He drew deeds of warranty and quit-claim of the premises from others claiming under Scott, and, as a justice of the peace or notary public, took the acknowledgment of such deeds. Upon these occasions also he was silent as to any defect in the title. The complainant entered into a contract with the defendants, Hurd & Smith, to sell and convey the premises to them for the sum of $8,000. He employed Wells S. Humphrey, a reputable attorney, who, for a long time, had been employed by the complainant when he had any legal business to do, to draw the contract. Humphrey accordingly drew the agreement and witnessed its execution. Hurd & Smith thereupon took possession and held it when the bill was filed. They employed Humphrey to procure an abstract of title. In examining the title he found there was no deed from Chapman. He thereupon sought out Chapman, and by representing to him that the object was to protect the title of clients, procured Chapman to execute a quit-claim deed of the premises to George P. Humphrey, the brother of the attorney, for the sum of $25. The deed bears date on the 10th of June, 1872. George knew nothing of the transaction until sometime afterwards. An action of ejectment was instituted in his name to recover the property. Baker tendered to him $25, the amount he had paid for the deed; offered to pay any expenses incurred in his procuring it, and demanded a release. He declined to accept or convey. The prayer of the bill is that the deed to George P. Humphrey be decreed to be fraudulent, and to stand for the benefit of the complainant; that the grantee be directed to convey to Baker, upon such terms as may be deemed equitable, and for general relief. Such is the complainant's case, according to the averments of the bill. The testimony leaves no room for doubt as to the material facts of the case.

The direction for drawing the contract between Hurd & Smith and Baker was given to the attorney by Robling, the agent of Baker. Baker resided in Canada. Hurd & Smith directed the attorney to procure the abstract of title. With this Baker and Robling had nothing to do. The attorney disclosed the state of the title to Hurd & Smith, but carefully concealed it from Robling. Hurd & Smith being assured by the attorney that whatever they might pay Baker could be recovered back if his title failed, executed the contract with Baker, and declined to buy the Chapman title, but gave the attorney their permission to buy it for himself. There is evidence in the record tending strongly to show that there was a secret agreement between them and the attorney; that if the Chapman title were sustaind, they should have the property for $5,000, which was $3,000 less than they had agreed to pay Baker. This would effect to them a saving of $3,000 in the cost. They refused to file this bill, and declined to have anything to do with the litigation. It thus appears that though unwilling to join in the battle, they were willing to share in the spoils with the adversary, if the victory should be on that side.

There is in the record a bill for professional services rendered by the attorney against Baker. It contains a charge of $2 for drawing the contract with Hurd & Smith. The aggregate amount of the bill is $43. The first item is dated July 5, 1871, and the last July 12, 1872. The latter is the charge for drawing the contract. There is also a like bill against Baker and Smith for $45, and one against Baker and Mears of $6. These accounts throw light on the relation of client and counsel as it subsisted between the attorney and Baker.

With respect to Chapman, we shall let the record speak for itself. Vincent testifies: "I asked him, How is it, Chapman? I thought that you owned that property" (referring to the premises in controversy). He said, "No; I never paid anything on it." He said, "Sammons has a right to rent. It is his property." * * * * * "I asked him how he came with the deed from Scott, and he said, 'It was only to shield Sammons; that afterwards Michael Dansmon paid the debt and the property went back to Sammons.'" * * * * * "When I met Bela Chapman, and he asked for Sammons and wife, he said he had drawn a deed from Sammons and wife to Belote for the premises and wanted them to sign it."

Francis Sammons, a son of Sammons, the grantor to Belote, says: "A part of a house situated on that lot three was leased by my father to Bela Chapman in 1851 for the purpose of storing goods, and afterwards lived in it a while. I collected the rent. I think he occupied it with his goods and family about three months. He never occupied or had possession of the premises at any other time, to my knowledge. He came from Mackinac when he put the goods in that house. He remained here four or five years after he came from Mackinac. He lived in Mackinac until his death. He came over to Cheboygan several times after he went to reside at Mackinac. Sometimes he would stay a week or two, visiting. At the time he lived here he was a notary public, justice of the peace and postmaster. I know he was in the habit of drawing deeds and mortgages for any one that called on him. I don't think there was any one else here during the year 1852 and 1853 who drew deeds and mortgages but Bela Chapman in this village. My father sold the premises to William S. M. Belote. My father was in possession of the premises from 1846 until he sold to Belote." Medard Metivier says: "I hold the office of county clerk and register of deeds for Cheboygan County; have held these offices since 1872." * * * * "I am in my sixtieth year. I came to live in this village in 1851. Lived here ever since, except about six years, when I lived in Mackinac and Chicago during the war. I know Jacob Sammons and Bela Chapman; they are both dead. I remember being at the house of Jacob Sammons when a deed was executed by Sammons and wife to Belote. I witnessed the deed. That deed was witnessed by and acknowledged before Bela Chapman, as notary public. I think there was another deed executed by Sammons and wife to Belote, which I

witnessed when Bela Chapman was present. I remember the circumstances distinctly of one deed being executed, witnessed by myself and Chapman, from the fact that the room was very dark, owing to Mrs. Sammons having very sore eyes, and we had to raise the curtain for more light. There was not any other full grown person there unless Mr. Belote was there, about which I can not state positively, than Mr. and Mrs. Sammons, Mr. Chapman and myself. A part of the deed which I witnessed was in print. It was an old-fashioned form of printed deed. Mr. Chapman brought the form from Mackinac or somewhere. He only had them here. I know the premises described in the bill in this cause, and Chapman was never in possession of them to my knowledge. I know Mr. Chapman's handwriting very well, and I remember particularly that the deeds witnessed by myself and Mr. Chapman and acknowledged before him were in his (Chapman's) handwriting, and that he drew both of them. I know one of the deeds then executed by Sammons and wife to Belote conveyed the premises in question and other property; can not tell all of the other property.' These witnesses are unimpeached, and are to be presumed unimpeachable. Their testimony is conclusive as to Chapman's relation to the property. If there could be any doubt on the point, it is removed by the fact that for $25 he conveyed property about to be sold, and which was sold by Baker to responsible parties for $8,000. This fact alone is decisive as to the character of the transaction with respect to both parties. No honest mind can contemplate for a moment the conduct of the attorney without the strongest sense of disapprobation.

Chapman conveyed by a deed of quit-claim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in the view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quit-claim deed can stand in that relation. May v. Le Claire, 11 Wall. 217. There are other obvious considerations which point to the same conclusion as a matter of fact. It is unnecessary to specify them, and we prefer not to do so.

The admissions of Chapman while he held the legal title, being contrary to his interest, are competent evidence against him and those claiming under him. He said the object of the conveyance to him was to protect the property against a creditor of Sammons. If such were the fact, the deed was declared void by the statute of Michigan against fraudulent conveyances (2 Comp. Laws of Mich. 146); and it was made so by the common law. The aid of the statute was not necessary to this result. Clemments v. Moore, 6 Wall. 312. Nothing, therefore, passed by the deed to Chapman's grantee. Chapman's connection with the deed from Sammons to Belote would bar him, if living, from setting up any claim at law or in equity to the premises. The facts make a complete case of *estoppel in pais*. This subject was fully examined in Dickerson v. Colgrove, not yet reported. We need not go over the same ground again. See, also, Cincinnati v. White's Lessee, 6 Pet. 431; Doe v. Morris and others, 3 East, 15; and Brown v. Wheeler, 17 Conn. 353. If Chapman had nothing to convey, his grantee could take nothing by the deed. The latter is in exactly the situation the former would occupy if he were living and were a party to this litigation. The estoppel was conclusive in favor of Belote and those claiming under him, and this complainant has a right to insist upon it.

But there is another and a higher ground upon which our judgment may be rested. The relation of client and counsel subsisted between the attorney and Baker. The employment to draw the contract with Hurd & Smith was not a solitary instance of professional service which the latter was called upon to render to the former. The bills of the attorney found in the record show the duration of the connection and the extent and variety of the items charged and paid for. They indicate a continuous understanding and consequent employment. Undoubtedly either party had the right to terminate the connection at any time; and if it were done, the other would have had no right to complain. But, until this occurred, the confidence manifested by the client gave him the right to expect a corresponding return of zeal, diligence, and good faith on the part of the attorney. The employment to draw the contract was sufficient alone to put the parties in this relation to each other. Galbraith v. Elder, 8 Watts, 94; Smith v. Brotherline, 62 Pa. St. 469. But whether the relation subsisted previously, or was created only for the purpose of the particular transaction in question, it carried with it the same consequences. Williamson v. Moriarty, 19 W. R. (Irish Law and Eq.) 818.

It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. Hoopes v. Barnett, 26 Miss. 428; Jett v. Hampstead, 25 Ark. 462; Fox v. Cooper, 2 Q. B. 237. In Taylor v. Blacklow, 3 Bing. (N. C.) 235, an attorney employed to raise money on a mortgage learned the existence of certain defects in his client's title and disclosed them to another person. As a consequence his client was subjected to litigation and otherwise injured. It was held that an action would lie against the attorney, and that the client was entitled to recover. In Com. Dig. tit. "Action on the case for deceit, A. 5," it is said that such an action lies "if a man, being entrusted in his profession, deceive him who entrusted him, or if a man retained of counsel became afterwards of counsel with the other party in the same cause, or discover evidence or secrets of the cause. So if an attorney act deceptive to the prejudice of his client, as if by collusion with the demandant, he make default in a real action whereby the land is lost." It has been held that if counsel be retained to defend a particular title to real estate, he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. Henry v. Raiman, 25 Pa. St. 354. Without expressing any opinion as to the soundness of

this case with respect to the extent to which the principle of trusteeship is asserted, it may be laid down as a general rule that an attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. He can not in such a way put himself in an adversary position without this result. The cases to this effect are very numerous, and they are all in harmony. We refer to a few of them. Smith v. Brotherline, 62 Pa. St. 461; Davis v. Smith, 43 Vt. 269; Wheeler v. Willard, 44 Id. 641; Giddings & Colman v. Eastman, 5 Paige, 561; Moore v. Bracken, 27 Ill. 23; Harper v. Perry, 28 Wis. 57; Hockenburg v. Carlisle, 5 Watts & S. 349; Hobedy v. Peters, 6 Jur. pt. 1, 1,794; Jett v. Olmstead, 25 Ark. 462; Case v. Carrol, 35 N. Y. 385; Lewis v. Helman, 3 House of Lords, 607. The same principle is applied in cases other than those of attorney and client. Where there are several joint lessees, and one of them procures a renewal of the lease to himself, the renewal enures equally to the benefit of all the original lessees. Barrel v. Bull, 3 Sandf. Ch. 15. Where there are two joint devisees, and one of them buys up a paramount outstanding title, he holds it in trust for the other to the extent of his interest in the property, the *cestui que* trust refunding his proportion of the purchase money. Van Horne v. Fonda. 5 J. C. Rep. 407. Where a surety takes up the obligation of himself and principal, he can enforce it only to the extent of what he paid and interest. Reed v. Norris, 3 Mylne & Craig, 375. Where a lessee had made valuable improvements pursuant to the requirements of his lease, and procured an adverse title, intending to hold the premises in his own right, it was held that he was a trustee and entitled only to be paid what the title cost him. Cleavenger v. Reimar, 3 Watts & S. 486.

The case in hand is peculiarly a fit one for the application of the principle we have been considering. It is always dangerous for counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. Such a case requires care and circumspection on his part. Here there could be no objection, there being no apparent conflict of interests; but upon discovering that the title was imperfect, it was the duty of the attorney promptly to report the result to Baker, as well as to Hurd & Smith, and to advise with the former, if it were desired, as to the best mode of curing the defect. Instead of doing this, he carefully concealed the facts from Baker, gave Hurd & Smith the choice of buying, and, upon their declining, bought the property for himself, and has since been engaged in a bitter litigation to wrest it from Baker. For his lapse at the outset there might be some excuse, but for his conduct subsequently there can be none. Both are condemned alike by sound ethics and the law. They are the same upon the subject. Actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is "constructive fraud," and is sufficient. Story's Eq. secs. 258, 311.

The legal profession is found wherever Christian civilization exists. Without it society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly, upon all proper occasions, the salutary rules which have been established for their government in doing the business of their clients.

We shall discharge that duty in this instance by reversing the decree of the circuit court, and remanding the case, with directions to enter a decree whereby it shall be required that the complainant, Baker, deposit in the clerk's office for the use of the defendant, George P. Humphrey, the sum of $25, and that Humphrey thereupon convey to Baker the premises described in the bill, and that the deed contain a covenant against the grantor's own acts, and against the demands of all other persons claiming under him.

And it is so ordered.

STATUTE OF FRAUDS—LEASE—ARBITRATION.

NORTON v. GALE.

Supreme Court of Illinois (Ottawa), June, 1880.

1. The statute of frauds will be satisfied by such a statement in a written contract as ascertains the price to be paid, although it mentions no specific sum, as for instance, if to pay a price to be settled by arbitration, or upon the valuation of appraisers to be selected by the parties.

2. Where a lease of lots, executed by both parties, fixed the annual rent for the first five years, and then provided that the amount of the rent to be paid annually for the next five years should be six per cent. on the appraised value of the premises, to be ascertained by appraisers, one to be selected by each party, and they to select another, in case they could not agree, it was *held* that the contract was not within the statute of frauds, as to the rent to be paid for the second five years.

3. Where the parties to a lease provide for rent to be paid yearly, at six per cent. on the appraised value of the demised premises, to be ascertained by the selection of property holders, this is not a submission to arbitration, and no notice to the parties is necessary before making the appraisement, unless the lease so requires, and the finding of the appraisers, when selected, will be conclusive upon the parties, except for fraud.

¶ Appeal from the Appellate Court of the First District.

This was an action by Gale against Norton on three leases of vacant lots in Chicago, executed by the former to the latter on the first of Febuary, 1872, to run for a term of fifty years; one, of five lots, for a yearly rent for the first five years at $1,000 per annum, payable quarterly in advance; one, of five lots, at $1,000 per annum for the first five years. payable the same way, and one, of ten lots, at $3,100 per annum for the first five years, payable quarterly in advance. Each lease contained the following clause:

"And the party of the second part further agrees that at least thirty days before the expiration of said five years he will choose one disinterested holder of real property of the City of Chicago, and notify in writing said party of the first part, or his agent or attorney, of such choice, and party of the first part will thereupon choose a like holder of real property, which said two parties shall at once proceed to appraise the cash value of said premises, exclusive of all improvements thereon; and in case they can not agree upon the same, shall choose a third disinterested holder of real property, and the award of the majority of the appraisers shall be final and binding; and thereupon, for the next succeeding five years. from the end of said first five years, said party of the second part will pay as rent for said premises, quarterly as aforesaid, a sum for each and every year of said five years equal to six per cent. per annum on the appraised value of said premises."

Before February 1, 1877, the expiration of the first five years, Norton selected as his appraiser James N. Clark, and Gale selected as his appraiser Geo. W. Fuller, and the two made and reduced to writing and signed and sealed the following appraisement:

"We, the undersigned, disinterested holders of real property in the City of Chicago, in the County of Cook, and State of Illinois, who were duly chosen as appraisers, to wit: James N. Clark, who was chosen by and on behalf of Nathaniel Norton, and George W. Fuller, who was chosen by and on behalf of Stephen F. Gale, to appraise the cash value of certain lots, pieces and parcels of land, situate in the City of Chicago, and particularly mentioned and described in three (3) certain leases of said premises, bearing date, respectively, on the first day of February. A. D, 1872, made and executed by the said Stephen F. Gale, as the party of the first part, and the said Nathaniel Norton, as party of the second part; to which said three (3) leases reference is hereby made for a particular description of the premises aforesaid, and which (3) leases are hereby made a part and parcel hereof, do hereby, in accordance with the terms, conditions and provisions of the three leases aforesaid, make, adjudge and appraise the cash value of the premises aforesaid, and as hereinafter described, as follows, to wit:

"The lots numbered one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9) and ten (10), in S. F. Gale's subdivision of block number fifty-two (52) in Carpenter's addition to Chicago, is hereby valued at the sum of two hundred dollars (200) in cash per foot front upon Washington street, excluding all improvements thereupon. The lots numbered nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27) and twenty-eight (28), in S. F. Gale's subdivision of block numbered twenty-six (26), in Carpenter's addition to Chicago, are hereby valued and appraised at the sum of one hundred dollars ($100) in cash per foot front upon West Lake street, excluding all improvements thereupon.

"In witness whereof, we have herewith set our respective hands and seals, this 15th day of January, A. D. 1877.

"JAMES N. CLARK, [Seal.]
"GEO. W. FULLER. [Seal.]"

Gale claimed that under this appraisement there was due for the first quarter of the second five years $1,125, to recover which the action was brought. By pleas, by objections to evidence offered by Gale, by evidence offered by himself and by instructions asked, Norton raised the question, on the trial in the circuit court, whether the appraisement was binding and conclusive upon him. The ruling of the circuit court upon all the contested points was in favor of Gale. Norton excepted, and took the case by appeal to the Appellate Court for the First District, and that court, on the 26th of June, 1878, affirmed the judgment of the circuit court. Gale appeals from that judgment of the appellate court, and assigns numerous errors, sufficiently noticed in the opinion.

Miller & Frost, for appellant; *Walker & Carter*, for appellee.

SCHOLFIELD, J., delivered the opinion of the court:

The first objection urged against the judgment below is that "Our statute says that no action can be brought upon a contract of this kind unless the contract shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party;" and it is thereupon argued that the appointment of the arbitrators is a necessary part of the submission,—that the submission can not be said to be made until the persons to whom it is made are selected.

The objection is not well urged. All of the terms of the contract upon which suit is brought, required by the statute of frauds to be in writing, are in writing. The amount to be paid per annum for the first five years is specifically expressed. The amount to be paid after the expiration of that period is six per cent. on the appraised value of the premises, that is to say, on the "value of the premises." Suppose the language had been simply to pay six per cent. on the value of the premises? Surely that would have been sufficiently definite and certain to have answered the requirements of the statute. The provision with reference to the appointment of appraisers relates solely to the mode of making proof of value, and is certainly as competent as any other mode of proof of value. It is said in Brown on the statute of frauds, sec. 378: "It is quite obvious that the statute will be satisfied

by such a statement as ascertains the price to be paid, although it mentions no specific sum,—as, for instance, if the agreement is to pay a price to be settled by arbitration, or to pay the same for which the property had been previously purchased." In Brown v. Bellows, 4 Pick. 178, it was referred to referees to fix the price to be paid for the property. The referees were not named in the indenture, but it provided that they were to be thereafter chosen. As against the plea of the statute of frauds it was held that after the price had been fixed by referees, chosen pursuant to the indenture, it was too late for the defendant to object that, by the statute of frauds, the indenture was invalid, because the referees and the price were not ascertained by the indenture itself.

Whether the reference here be called one to arbitrators or simply to appraisers, can, so far as this question is concerned, make no difference. The rule controlling is, *id certum est quod certum reddi potest*, and has nothing to do with the name by which the third party, to whom the valuation is left, shall be called.

The next, and most serious objection urged against the judgment below, is, the stipulation to refer the question of the value of property to holders of real property in Chicago, as provided in the leases, is a submission of that question to arbitrators, and that the valuation made by Clark and Fuller is an award and not merely an appraisement; and, being an award, it is void, because made without notice to the parties to the submission,—and after refusal to hear appellant's witnesses on the question of value, and argument thereon by his counsel, which evidence and argument, it is claimed, would have shown that the valuation, as made, is unjust to him. There was no evidence introduced, or offered, showing that the valuation, as made, was not the honest expression of the judgments of the appraisers; and the only question, in reality, is, was appellant entitled to notice and to be heard on the question of value? If he was not, there is nothing in the evidence introduced or offered, showing objectionable conduct in the appraisers.

In one or more of the pleas there may be allegations of fraud, but there was no attempt to support such allegations by proof. And the instructions asked only go to the question of the right of appellant to notice, and to be heard by witnesses and counsel.

The authorities upon the question of notice are not entirely harmonious. In some cases in New York, and notably in Peters v. Newkirk, 6 Cow. 103, and McMahon v. New York and Erie Railroad Co. 20 N. Y. 463, ruling may be found sustaining the position of the appellant. But the authority of Peters v. Newkirk is much impaired by what is said in reference to it in Elmendorf v. Harris, 5 Wend. 521. It was there said: "As to the appraisement referred to in Peters v. Newkirk, it could hardly be dignified with the name of an award. Even if it should be so considered, it was not made the foundation of an action." And so what was said in regard to notice, however correctly or incorrectly, was *obiter dicta*. And in McMahon v. New York, etc. R. Co., there was a provision in the contract requiring the work to be done under the direction and supervision of the engineer, and providing that he should decide every question that might arise between the parties, and that his decision should be final. It was held that his position was not unlike that of an arbitrator, and that his estimates would not be binding, unless they were made upon notice. But this, in principle, is in conflict with the ruling of this court in kindred cases.

In McAuley v. Carter, 22 Ill. 53, the parties to a building contract agreed that the superintendent should pass upon the work and certify as to the payments to be made. His decision was held to be binding unless fraud or mistake, on his part, should be shown; and it was also held that notice need not be given of the certificate obtained from the superintendent, where the contract does not require it. Korf v. Lull, 70 Ill. 420, follows, and approves McAuley v. Carter, and overrules what was said in Packard v. Van Schoick, 58 Ill. 79, requiring notice in such cases.

There may be found other cases, besides those to be found in the reports of New York, affording sanction to appellant's position, but we do not deem it important to refer to them in detail, and shall content ourselves with briefly referring to some authorities sustaining what we regard as the more reasonable rule.

In Leeds v. Burrows, 12 East, 1, the plaintiff was the outgoing and the defendant the incoming tenant of a farm, and it had been agreed between them that the referees should value the hay and the spike roll, for which the defendant was to pay, etc. "Le Blanc, J., observed that it was only left to the persons to whom the matter was referred, to put a value upon the articles which the parties had already agreed should be paid for." In note "a," at the conclusion of the report of the case, it is shown that after a second trial the case came before Lord Ellenborough, C. J., on a motion for a non-suit, upon the ground that the agreement included a reference of a right of action for damages, etc., and he said "that it was only appointing persons to settlean account of what was due between the parties for the value of the different articles. The parties had no contemplation of submitting any differences to the award of arbitrators, and no such terms ought to be imposed upon them against their own meaning and the meaning of the stamp acts." In Lee v. Hemingway, 3 Nev. & M. 860, there was an agreement to sell land at a particular price, to be fixed by award. The price was fixed, and one party applied for an attachment under the award, claiming that it was an arbitration; but Littledale, J., held otherwise, observing: "It is not properly an arbitration; it is, in effect, an agreement to sell the land, and this is not a settlement of any difference between the parties, but merely something auxiliary to the contract entered into between them for the purpose of the sale of the land; and accordingly upon a breach of the contract you

have your remedy, for it is clear that a specific performance would have lain here in that case. It is clear, also, that an action would have lain for damages. But not being an award, because it was not a matter in difference that was referred by these parties, you can not have it by way of attachment." In Collins v. Collins, 26 Beav. Ch. 306, there was a written contract that the purchase money of all the premises agreed to be sold should be determined by Mr. Mason for the vendor, and Mr. Moss for the purchaser, and that they should choose an umpire before entering upon a valuation. The Master of the Rolls said: "It appears to me that the case of Leeds v. Burrows draws the proper and fit distinction between an arbitration, in the proper sense of the term, and an appraisement or valuation, for valuation undoubtedly precludes differences, in the proper sense of the term; it prevents differences, and does not settle any which have arisen." Russell, in his work on Arbitration, (3d ed.) p. 43, after referring to these cases, says: "The valuer, etc., is not an arbitrator, in the proper sense, unless there have been differences between the parties on the point previous to their submitting it to his decision. A decision which precludes differences from arising, instead of settling them after they have arisen, is, for many purposes, not an award." See Morse on Arbitration and Award, 40.

In Garred v. Macey, 10 Mo. 161, the agreement provided, that in consideration that A shall give possession of certain public land to B, B shall pay the value of the improvements, to be ascertained by five householders. It was held that the decision of the persons thus selected was not an award. In Currey v. Lackey, 35 Mo. 389, the agreement was to leave to a third person to determine the value between two slaves exchanged. It was held this did not make such person an arbitrator. The court said: "A reference to arbitration occurs only where there is a matter in controversy between two or more parties." See, also, to a like effect, opinion of Senator Seward in Garr v. Gomez, 9 Wend. 649; Mason v. Bridge, 14 Me. 468; Oakes v, Moore, 24 Id. 214; Rochester v. Whitehouse, 15 N. H. 468.

There was, here, no matter in controversy when the leases were executed, or, for that matter, when the appraisers were selected, and the object was to preclude or prevent the arising of differences, and not to settle differences which had arisen. The reason that notice of the time and place that arbitrators intend to act upon the matter submitted to them is required, is to enable the parties to present their case by evidence and by argument. Morse on Arbitration and Award, 117. And so notice of the meetings of the arbitrators for the purposes of deliberation and making up the award need not be given, since the parties are not expected to attend. Id. 118. But where the office of the party to whom the submission is made is limited to a simple appraisal of value, he is expected to act on his own knowledge and opinions only. And hence, neither evidence of witnesses nor statements of parties or counsel is contemplated. 2 Parsons on Contracts (6th ed.), 706, note n; Eads v. Williams, 31 Eng. L. and Eq. 203.

By the express terms of the leases, the persons to be selected here are not to ascertain and determine, from witnesses or otherwise, but simply to "appraise the cash value of said premises," etc. They are to be disinterested holders of real property of the city, and one is to be selected by each party. So, it is be presumed, the design was to select those who would need no evidence or argument, but be prepared at once to make a valuation. The language used precludes delay, and requires those selected to "at once proceed," not to inquire or hear evidence or argument, but "to appraise," that is to say, fix a valuation on the property. The language, in our opinion, as plainly means this as any language that might have been employed could.

Conceding that we are right in holding that, under this language, appellant would not have been entitled, as a matter of right, to have introduced witnesses, or have been heard, by himself or counsel, on the question of the value of the property, it is quite clear that he was not entitled to notice, for it can not be that a party is entitled to a notice which will enable him to exercise no right or privilege.

We think the judgment of the Appellate Court was right, and it must, therefore, be affirmed.

Judgment affirmed.

DICKEY, J., dissents.

SALE WITHOUT DELIVERY AND SEPARATION VOID AS TO CREDITORS.

FRANKLIN v. GUMMERSELL.

St. Louis Court of Appeals, May, 1880.

1. The owner is not restricted by the sheriff and marshal's act (Mo.) to his claim under the statute; he may resort to his bond or to his action against the execution plaintiff.

2. A sale unaccompanied by immediate delivery is void as to creditors, though delivery be made before levy by the creditors.

3. If a person whose goods are by his fault intermingled with those of an execution debtor, has notice of the levy, the burden is on him to make the separation.

Appeal from St. Louis Circuit Court.

G. M. Stewart for appellants; *McComas & McKeighan* for respondents.

HAYDEN, J., delivered the opinion of the court:

This is an action in the nature of trespass *de bonis asportatis*. After a general denial, the defendants pleaded that the goods were taken by the sheriff by virtue of a writ of attachment in a suit, in which the defendants were plaintiffs and Carabin & Co. defendants, the levy having been on the goods as the property of the latter, who were debtors of the present defendants; that the present plaintiff thereupon claimed the property as hers, and the defendants gave the sheriff a bond to in-

demnify him, according to law, which was filed in the attachment case.

It appeared that Carabin & Co., in February, 1877, were engaged in selling millinery and similar goods in St. Louis, and that the plaintiff was in their employ as a saleswoman. The plaintiff claimed title to the articles attached and sold by the sheriff, by virtue of sales from Carabin & Co. and from other persons to herself. These goods, which were bought of Carabin & Co., remained in their store, though they were separated from their goods, and placed in another part of the store, where, with other goods, which the plaintiff claimed to have bought from other persons, they remained, the plaintiff, who was at the time a saleswoman for Carabin & Co., selling to customers goods for them as well as the goods which she claimed to be her own.

Into the details of this part of the case it is unnecessary to go, as, apart from the question discussed below, there was no such delivery as the law requires, and no change of possession that will satisfy the statute. Wag. Stat. p. 281, sec. 10. The material inquiry is whether, as the creditors of Carabin & Co. did not attach until after the goods were removed from the room, which formed the store of Carabin & Co., the subsequent removal is sufficient to satisfy the statute.

While the goods remained in the store of Carabin & Co., and were being sold, as stated, that firm was pressed by creditors, and on the 2d day of February 1875, made an assignment. On the preceding evening the goods in question were removed by the plaintiff from their store and placed in another store hard by, where, about twenty days afterwards, they were attached by the defendants. There was judgment below for the plaintiff.

It is contended by the defendants, that the facts that the plaintiff made claim to the attached property, and that thereupon, under the Sheriff's Act of 1855, the defendants gave bond of indemnity, constitute a bar to this action. This position seems to confuse the remedy against the sheriff with that against the levying creditor. If a claim is made according to the act, and the officer demands and receives a sufficient bond of indemnity from the creditor, the claimant has no remedy against the officer. Bradley v. Holloway, 28 Mo. 150. But on the basis that the claimant is compelled to sue, the act certainly gives no new right to the claimant of the property, though it may better secure a right he possesses. It relieves the officer and incidentally affords a remedy to the claimant of the property, who "may bring a civil action on such bond." Acts 1855, sec. 4, p. 465. As the statute was not passed to relieve the attaching creditor, and as its effect is merely to give a new remedy, there is no reason for disregarding the established rule, and holding that the statutory remedy is exclusive. And such has not been the interpretation which the act has received in this State. Peckham v. Lindell Glass Co., Mo. App., No. 1056; State v. Doan, 39 Mo. 44; see Wetzell v. Waters, 18 Mo. 396. In Regor's Admr. v. Owings, 35 Mo. 506, the question was as to the measure of damages, when the owner, having claimed under the act, and the plaintiff in the execution having admitted the claim, refused to receive back the property, and insisted on his right to recover its value, as well as damages for the taking. That he was there so far concluded by the statute as not to be entitled to recover the value when he refused to avail himself of the right secured to him by statute, namely the right to the speedy return of the property in specie, is nothing to the present purpose. The defendants here took the property and sold it, thus denying to the plaintiff the opportunity of regaining it and forcing her to sue.

If, as declared by the uniform course of decisions in this State, such a sale as that of Carabin & Co. to the plaintiff was void, and no title passed to the plaintiff as against their creditors, it is difficult to see how this sale was validated by the subsequent removal of the goods. But the contradiction in terms involved in this doctrine is not so serious a matter, as its effect in violating the spirit and purpose of the statute. By the words "regard being had to the situation of the property," which follow the words making the sale void unless the sale "be accompanied by delivery in a reasonable time," the intent is shown to make delivery and a genuine change of possession essential in all cases within the purview of the statute. It is perfectly true that it is only creditors of the vendor and purchasers in good faith, who are within the purview of the statute, and that the requirement is not as to sales where they are not concerned. It is also true that the mere fact of there being creditors is nothing. The claimant has possession, and this is good, except as against process of some kind on the part of the creditor, who must show not merely a claim against his debtor, but a right to proceed against the property. But it by no means follows that if the possession is taken before the process of the creditor is levied, the alleged vendee will hold against the creditor. This is what seems to be assumed, (Clute v. Steele, 6 Nev. 337); but the cases apparently relied on do not support the position. Paige v. O'Neal, 12 Cal. 483; Bickerstaff v. Doub, 19 Cal. 112; Thornburgh v. Hand, 7 Cal. 554. The doctrine of these cases is, that where a stranger to the creditor's process is in the possession of the property, claiming it by a transfer from the debtor, which would prevent the latter from taking possession, the creditor or officer must justify by showing that he has a judgment and execution, or some process regularly issued, as attachment. This is well established doctrine. It is thus the creditor gets his *locus standi;* his position in court from which he can attack the sale. But it is a mistake to suppose that having got this, the whole question of whether the sale complied with the statute, or was fraudulent in law, is not open to him. That question obviously is open to him, since he is an attaching creditor, and as an element of it, the inquiry as to reasonable time is vital.

It is just at this point that the difference between our statute and the common law, as generally interpreted—under which latter were made

most of the decisions relied on by the plaintiff—becomes essential. To confuse our statute with a law under which possession remaining with the vendor was merely evidence tending to prove fraud, is to ignore the reason why the statute was created. Under a law so different from ours it might well be held that the delivery was good, if perfected before execution. But it is the essence of our statute, that when by his levy the creditor has gained his right to question the sale, every element of its validity as a statutory sale is open to investigation. To this effect is the decision in Chenery v. Palmer, 6 Cal. 119, a case which appears never to have been questioned except in Clute v. Steele, *supra*, where, as indicated by the quotation from Hilliard on Sales and the authorities cited from that work, the Supreme Court of Nevada evidently misapprehended the bearing of the later cases in California, and of similar decisions elsewhere. It can not be denied that a desire to avoid the hardship of particular cases has led to some decisions, the tendency of which is to fritter away the wholesome provisions of the law and to destroy a peculiar advantage which it has over the law it replaced—its certainty.

But most of the decisions relied on by the plaintiff depend on other features than any here involved. As stated, decisions not under a similar statute are not in point, while decisions of which Smith v. Stern, 17 Pa. St. 360, is an example, merely relate to the reasonableness of the time, within which possession is taken. This last case in fact is an authority against the plaintiff. In this State there are no lax decisions warping the statute. The later cases affirm the earlier ones and declare that the statute requires "such a change as to preclude the hazard of the seller deriving a false credit from the continuance of his apparent ownership." Wright v. McCormick, 67 Mo. 426; Lesem v. Herriford, 44 Mo. 325; Bosse v. Thomas, 3 Mo. App. 472; Bishop v. O'Connell, 4 Mo. App. 578. The case of Nash v. Norment, 5 Mo. App. 545, has no bearing on the question here involved. That was not a case of sale, but, as intended, of mortgage; and, as it turned out, of a debtor preferring a creditor. No question of delivery arose under the statute, and, in fact, there was never any creditor who levied on the property in question.

Thus on the basis of the facts we have assumed, the sale was void in law as to the goods of Carabin & Co. As to those purchased from other persons by the plaintiff, and put by her with goods of the same kind, which she received from Carabin & Co., the question is to be solved by the application of the rule, that where one wrongfully intermingles goods of the same kind belonging to him with goods of another, the burden is on the wrongdoer to distinguish and separate the two, or take the consequences of loss. But the present is not merely a case where the goods of A, found intermingled with the goods of B, are attached for the debt of A. If in such case it is impossible for the creditor to distinguish between the two, especially if the blame be attributable to B, the whole may be attached as the goods of A. Taylor v. Jones, 42 N. H. 25; Lewis v. Whittemore, 5 N. H. 364; see Gilman v. Hill, 36 N. H. 311. If the person, whose goods are so intermingled, has notice of the levy, the burden is on him to make the separation. Bond v. Ward, 7 Mass. 123.

In the case at bar, however, the levy was on property in the hands of A, on the assumption that A's title was fraudulent, and that B owned the goods. If certain goods in fact belonged to A, and were mingled with those of B, the creditor of B had no right to demand a selection at the hands of A, unless there was actual fraud in respect to the intermixture on the part of A. In such case A may, in good faith, claim all of the goods as his, and he can not be deprived of the opportunity of testing his right to the whole, which right, as here, may not depend on actual fraud. His right to the goods so intermixed with those of the debtor, depends on whether the intermixture is fraudulent on A's part. If he was privy to no design on the part of the debtor to cover up his goods or keep them from attachment; but innocently mingled his own goods with those of his debtor, believing all were his own, he would be entitled, as against the defendant, to recover the value of his goods. Treat v. Barber, 7 Conn. 274; Drake on Attach. § 199. It would lie with the plaintiff to establish the title, and with the defendant to prove a fraudulent intermixture.

The plaintiff's objection as to the defense not being admissible under the pleadings, was not properly taken below, and need not be further noticed here.

It follows from what has been said that the instructions were erroneous; and for this error the judgment must be reversed and the cause remanded for a new trial.

NOTE.—In the case of Edwards v. Harben, 2 T. R. 587, it was held that "if there is nothing but the absolute conveyance, without the possession, that, in point of law, is fraudulent." This case has been very generally followed in the United States. In Hamilton v. Russell, 1 Cranch, 309, Marshall, C. J., says: "An absolute bill of sale of goods is fraudulent as to creditors, unless possession accompanies and follows the deed." In England, the case of Edwards v. Harben has never been overruled, but this doctrine has not been extended beyond the express terms of that decision, and it is said in Benjamin on Sales, 1st Am. Ed. §485: "Apart from this very exceptional case, (Edwards v. Harben, *supra*,) the authorities are all in accordance in treating the question of *fraus vel non*, as one of fact for the jury, even where the vendor remains in possession." And see Hilliard on Sales, p. 177, ch. 8, § 2.

This subject is considered at great length in the notes to Twyne's Case, 1 Sm. L. C., Vol. 1, p. 1. In the American note, Id. p. 52, the annotator divides the different courts of the Union into three classes. In the first, which includes the courts of the United States, of Kentucky, Illinois, Alabama, Indiana and Florida, the principle established is, that "if possession be retained inconsistently with the legal nature and purpose of the transfer," the conveyance is fraudulent in law. And this, it is said, was the law in Virginia before Davis v. Turner, 4 Gratt. 423. New Hampshire and South Carolina are considered as nearly resembling this class.

The second class, comprising New York before the Revised Statutes, Pennsylvania, Connecticut and Vermont, "differs from the first chiefly in holding that delivery of possession is necessary against creditors, in case of mortgages and contingent transfers, as well as in the cases of absolute sales; they hold all conveyances are fraudulent in law, where possession does not pass with the title, unless it had been retained for reasons satisfactory to the court." In the third class, the distinction, taken in the first between absolute and contingent sales, is adopted; but it is held that retaining possession inconsistently with the conveyance is only evidence of fraud for the jury. This class comprehends the courts of Massachusetts, Maine, Ohio, Tennessee, Missouri, Georgia, Arkansas, Texas and North Carolina."

The earlier cases in Missouri, however, held "that retention of possession on sales and mortgages was fraudulent in law." Id. p. 88; Rocheblane v. Potter, 1 Mo. 561; Foster v. Wallace, 2 Mo. 231; Sibley v. Hood, 3 Mo. 290; and King v. Bailey, 6 Mo. 576. But Shepherd v. Trigg, 7 Mo. 151, overruled these and held that such retention was *prima facie* evidence of fraud only, and evidence was admissible to show that the transaction was fair.

2. The statute of New York, which went into effect January 1, 1830, provides (Rev. Stat., Part II, ch. 7, tit. 2, § 5): "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers." This the Supreme Court, in Hall v. Tuttle, 8 Wend. 380, say, contains what the law had been ever since the 13 Eliz. ch. 5, and what the common law was before that statute was enacted. But the learned annotator to Twyne's Case, *supra*, says, that "the repugnancy and the obscurity of the whole statute have led to an extraordinary and most interesting conflict between the judiciary, and the more popular constitution of the court of errors."

The statute of Missouri, § 10, ch. 67, R. C. 1845, differs from the New York statute in not including assignments of goods, etc., by way of mortgage, etc., and in some other particulars. It provides: "Every sale made by a vendor of goods and chattels in his possession, or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of the possession of the things sold, shall be presumed to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear to the jury, on the part of the persons claiming under such sale, that the same was made in good faith and without any intent to defraud such creditors or purchasers." The change by amendment (see Gen. St. 1865, p. 440, § 10), consists in omitting all that part beginning "and shall be conclusive evidence of fraud," etc., and in substituting in the first clause "held" for "presumed."

The cases of State v. Smith, 31 Mo. 566; State v. Rosenfield, 35 Mo. 473; Hartman v. Vogel, 41 Mo. 570, were decided under the statute of 1845. The change in 1865, the court say in Claflin v. Rosenberg, 42 Mo. 439, "restored the ancient rule," viz.: "that the retention of personal property by the vendor after sale, amounts to fraud *per se*." See, also, Lesem v. Herriford, 44 Mo. 323, Wright v. McCormick, 67 Mo. 426; Stern v. Henley, 68 Mo. 262, and cases cited, as well as those cited in the principal case.

Statutes resembling the New York and Missouri statutes exist in Oregon, Wisconsin, Kansas, Michigan, Minnesota, Nebraska, Utah, California, Colorado, Montana and Nevada. In Utah, California, Colorado, Montana and Nevada, the retention of possession is made conclusive evidence of fraud.

4. *As to Effect of Subsequent Delivery.*—The case of Clute v. Steele, 6 Nev. 335, is commented upon in the principal case. In that case the court say, "There has been a uniformity of holding upon the necessary status of those who might question such a sale, and the conclusion is, that no creditor at large may do so; and that a delivery before the attachment of any lien of a creditor, will satisfy the law and validate the sale." Citing Hilliard on Sales, 183 and note; Bartlett v. Williams, 1 Pick. 288; Kendall v. Samson, 12 Vt. 515; Coty v. Barnes, 20 Vt. 19; Wilson v. Leslie, 20 Ohio, 161, Brown v. Webb, 20 Ohio, 389; Nelson v. Wheelock, 46 Ill. 25; Frank v. Miner, 50 Ill. 445; Smith v. Stern, 17 Pa. St. 360; Levin v. Russell, 42 N. Y. 251; Hoopsmith v. Cope, 6 Whart. 53; Murray v. Riggs, 15 Johns. 571; Snydor v. Gee, 4 Leigh, 535; Carr v. Glasscock, 3 Gratt. 354. And further say, "Whatever the reason for this rule, it is uniform; and in California and Pennsylvania, where once an opposite opinion was held, such has been substantially, if not in express language reconsidered and overruled." Id. p. 339. In Bartlett v. Williams, 1 Pick. 288, "L gave a bill of sale of a vessel to B, and B promised in writing to reconvey upon the payment of a promissory note due from L. B, however, did not take possession until eight months after the delivery of the bill of sale: Held, nevertheless, that B's title was good against an attachment made by a creditor of L, after such possession taken." In Snydor v. Gee, 4 Leigh, 535, held: "If an absolute sale of chattels, fair in itself, be not accompanied and followed by immediate possession, but possession is taken by the vendee before the rights of any creditor of the vendor attach the sale is good against the vendor's creditors." "The taking possession will at least make it the same thing as if the deed was then made. See the remarks of Bayley, J., in Jones v. Dwyer, 15 East, 27." Id. p. 549. The distinction between this constructive fraud and absolute fraud is also made in Kendall v. Samson, 12 Vt. 517. The court say: "Whatever fluctuation there may have been in the decisions of the courts of our sister States, with us there has been but one course of decision. Upon the sale of a chattel we have required a substantial visible change of the possession, and one which is exclusive in the vendee; otherwise the sale is void as against the creditor of the vendor." * * * "Though upon the sale of a chattel there may not have been such a change in the possession as is necessary to protect it against the creditors of the vendor, yet such a change may at any time be perfected before an attachment intervenes. If the change does not immediately follow the sale, this would indeed be proper matter to go to the jury on the question of a fraudulent sale in fact; but it would be too much to hold that the change in the possession could not be perfected subsequently to the sale, so as to avoid the effect of the principle applicable to sales, fraudulent *per se*, provided no attachment had intervened." *Contra*, "A sale of personal

property, unaccompanied by immediate delivery, is void as to creditors, and this though delivery be made before levy is made by the creditors." Chenery v. Palmer, 6 Cal. 119, cited in principal case.

ABSTRACTS OF RECENT DECISION.

NOTES OF RECENT DECISIONS.

ACTION BY MARRIED WOMAN FOR INFRINGEMENT OF PATENT.—A married woman may bring a suit in the United States Circuit Court in a district of New York for the infringement of a patent committed in that State, without joining her husband. United States Circuit Court, Southern District of New York. Opinion by BLATCHFORD, J.—*Lorillard v. Standard Oil Co.* 22 Alb. L. J. 492.

COMMON CARRIER—FORWARDER—REGULATIONS.—When a railroad company receives goods from a connecting road to be transported to the owners, they are bound to forward them forthwith; and they can not justify their detention on the ground that, by their regulations, goods so received are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods. Affirmed. Opinion by APPLETON, C. J.—*Dunham v. Boston, etc. R. Co.*

INSOLVENCY — INDIVIDUAL AND PARTNERSHIP DEBTS—PROOFS OF CLAIMS.—1. Two persons, partners, not having adopted any firm name, made notes in their individual names, one as maker and the other as payee and indorser, and got the notes discounted at a bank, for the purpose of using the money obtained thereon, and using it in their partnership business. They are in insolvency and have estates both as partners and as individuals. It was not known to the bank, when the notes were discounted, that they were partnership papers or given for partnership purposes: *Held*, that the bank had an election to prove its claim either against the partnership estate, or against the estates of the individual members of the firm; but was not entitled to prove them against both the joint and several estates. 2. The bank having filed the claims against all the estates before the rule affecting its interests had been established by statute or judicial decision, a reasonable time is allowed to reconstruct the proofs in accordance with the principles of the decision given. Affirmed. Opinion by PETERS, J.—*Ex parte First National Bank.*

INSOLVENCY — PRIVATE AND PARTNERSHIP INDEBTEDNESS—PROOF OF CLAIM.—I. The holder of a joint and several note given by partners in their partnership name, they being in insolvency as partners and individuals, is entitled to prove his note against the joint estate of the firm, and also against the several estates of the individual members of the firm, and to receive dividends from all the estates. 2. The holder is entitled to receive dividends upon the whole claim, provided he does not receive in all more than his full due, unless he has received a dividend on one estate before making proof against another. Where a dividend has been paid, and generally when declared, on one estate before proof is made against another, the amount thereof should be deducted, and a dividend from the balance only allowed from the other. 3. When the members of a firm, having no firm name and no joint estate other than that of the firm, give a joint note in their individual names for money borrowed for and used in their partnership business, such note is provable in insolvency against their partnership estate. Affirmed. Supreme Court of Maine. Opinion by PETERS, J.—*Ex parte Mason.*

MALICIOUS PROSECUTION—GROUND OF PROSECUTION—WHAT MUST BE SHOWN—FAILURE OF PROSECUTION.—In an action by T against K and others for malicious prosecution, it appeared that the prosecution complained of was set on foot by the defendants, and rested upon an affidavit drawn up by one of the defendants and verified by K, the other, wherein a larceny of deeds was charged to have been committed by T from K; but the facts and circumstances of the case were set forth and showed that T, having persuaded K to let him have possession of deeds from him to her, of real estate (belonging to her, but the title to which was held by him in trust), for the purpose of examination and correction, refused to return them to her, but kept them by violence, and afterward conveyed the real estate to another. It also appeared that at the time the deeds were not recorded. *Held*, that if the statement of surrounding circumstances in the affidavit were true, the action for malicious prosecution could not be sustained, even though the district-attorney afterwards dismissed the indictment against T, after K had been heard, as not sustained by the evidence. The affiant was responsible for the statements in her affidavit, but not for any legal conclusion therefrom of a police magistrate, or a district-attorney, or a grand jury. In order to compel a defendant in an action for malicious prosecution to go into a defense, the plaintiff must show, first, the want of a reasonable and probable cause for the complaint in the proceeding against plaintiff (Williams v. Taylor, 6 Bing. 183), and, second, that it was instituted by malice. As to the first ground, the plaintiff is bound to give in evidence facts sufficient to satisfy a reasonable mind that his accuser had no ground for the proceeding but a desire to injure him, and whether he had done so was for the court to determine as matter of law, assuming the evidence was true. Stewart v. Sonneborn, 98 U. S. 189; Halles v. Marks, 7 H. & N. 56; Masten v. Deyo, 2 Wend. 424; Besson v. Southard, 10 N. Y. 236; Sutton v. Johnstone, 1 Term R. 269; Turner v. Ambler, 10 A. & E. 252. Judgment reversed. New York Court of Appeals. Opinion by DANFORTH, J.—*Thaule v. Krekeler.*

UNITED STATES SUPREME COURT.

October Term, 1879.

LIFE INSURANCE — WHETHER INSURED WAS AFFLICTED WITH DISEASE A QUESTION FOR THE JURY.—Suit on a policy of life insurance. The application contained the following interrogatories and answers, among others: "Seventh. Has the party" (Louis Moulor, the person whose life was insured) "ever been afflicted with any of the following diseases? Answer yes or no to each. Insanity? No. Gout? No. Rheumatism? No. Palsy? No. Scrofula? No. Convulsions? No. Dropsy? No. Smallpox? No. Yellow-fever? Yes. Fistula? No. Rupture? No. Asthma? No. Spitting of blood? No. Consumption? No. Any diseases of the lungs and throat? No. Or of the heart? No. Or of the urinary organs? No." Interrogatory twelfth. "How long since the party was attended by a physician? For what disease or diseases?" Answer. "Not since the year 1847, when he had the yellow-fever." There was the usual clause as to the answers being warranties of the truth, etc. The defense set up at the trial was that some of the answers to the interrogatories contained in the ap

plication were untrue, and this defense was attempted to be supported by the testimony of a single witness, who testified that the insured had been treated by him for other diseases. There was, however, in evidence the statement of two medical examiners attending the application. They represented the assured as in perfect health, and as having never had any constitutional disease except yellow-fever, and a curvature of the spine in his early youth, and as having no predisposition, either hereditary or acquired, to any constitutional disease. The court instructed the jury to find for the defendant. *Held*, error. That he was treated for certain diseases is not conclusive that he had them. The most skillful treatment sometimes is given when the existence of a particular disease is only suspected, not known, and when afterwards it appears the physician was mistaken. The question was for the jury to decide. Nor was the evidence sufficient to enable the court to conclude, without reference to the jury, that the answer to the twelfth interrogatory was untrue. The entire interrogatory should be considered as one. It was, "How long since the party was attended by a physician? For what disease or diseases?" To this the answer was, "Not since the year 1847, when he had the yellow-fever." It may well be that the applicant understood the interrogatory as asking information respecting attendance for a particular disease or diseases and their description, especially as the thirteenth interrogatory sought information respecting the party's *usual medical attendant*, and the name of that attendant was truly given.—*Mouler v. American Life Ins. Co.* In error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Opinion by Mr. Justice SWAYNE. Judgment reversed.

SALE OF LANDS- ASSIGNMENT — GUARANTY—FRAUDULENT REPRESENTATION—REPORT OF REFEREE.—B contracted to sell to the Improvement Co. several hundred acres of pine lands for a sum payable in instalments. Two days after its execution, the contract was assigned to the M. Co., the vendor assenting and the latter company guaranteeing the payment of the instalments. The first payment not having been made, B brought his action on the guaranty. The defendant set up fraudulent representations of the plaintiff as to the quantity of timber on the lands. The case was tried before a referee, who found in favor of the plaintiff. He also found, as a matter of fact, that Bronson, who acted for the Improvement Co. in the transaction in which the assignment and guaranty were made, exhibited at the time to Mason, who acted for the M. Co., a plat of the lands in the presence of the plaintiff, and represented that they contained 5,000,000 feet of good merchantable pine timber; whereas, as a matter of fact, they contained only 1,237,197 feet of such timber, but that there was a large quantity of additional timber which was poor, the defects of which could not be discovered until after it was cut. He further found that the plaintiff had never seen the lands, and that the M. Co. was aware of the fact; and that all the knowledge he had of the quantity of the timber was derived from an estimate furnished him by his grantor. The referee also states in his report that "he does not find" that the plaintiff's attention was called to the plat exhibited, or that he made any representations in relation to the quantity of timber on the land, or that he had any knowledge of the quantity at the time, or that the estimate furnished to him by his grantor was before him, or that he alluded to it, or that the representations of Bronson to Mason as to the quantity of the timber were made in his hearing. Exceptions were taken to the report and overruled by the court below. *Held*, 1. That the false and fraudulent representations—assuming that they were fraudulent as well as false—of the agent of the Improvement Co. to the agent of the M. Co., as to the quantity of timber on the lands purchased, in which representations the plaintiff did not participate, did not release defendant from liability on its guaranty. 2. That the report of the referee in finding certain facts inferentially is defective. The findings should have the precision of a special verdict, and specify with distinctness the facts found, and not leave them to be inferred. "I do not find" that the plaintiff knew certain facts, is a defective statement, and ought not to be received as equivalent to a direct finding that the plaintiff did not know the facts mentioned; although it is probable that the referee intended it to have that meaning. But defects of this character in the finding should have been called to the attention of the court below and a more definite finding required of the referee. They can not be considered here for the first time.—*Mason Lumber Co. v. Buchtel.* In error to the Circuit Court of the United States for the Western District of Michigan. Opinion by Mr. Justice FIELD. Judgment affirmed.

SAME CASE—RES ADJUDICATA.—In the preceding case, *supra*, between these parties we affirmed the judgment of the court below, recovered for the first instalment of money due upon the contract of purchase of certain timber lands in Michigan, the payment of which had been guaranteed by the defendant below, the Lumber Company. The present action was for the remaining instalments of the purchase-money. To the first action the defendant set up that it was induced to make the contract of guaranty by false and fraudulent representations of the plaintiff as to the quantity of merchantable timber on the land. To the present action it sets up the same defense, and also that the representation made as to the quantity of timber, to induce the execution of the contract, amounted to a warranty, upon breach of which it was entitled to recoup the damages sustained. To meet these defenses the plaintiff produced the judgment in the former case; and the question presented for determination is, whether that judgment was conclusive. As to the first defense there can be no doubt that such must be the effect of the judgment. The case was between the same parties for the first instalment on the contract guaranteed, and a recovery was there resisted upon precisely the same ground here urged. The extent and effect of a former recovery between the same parties upon the same question raised in a new action have been so often considered and determined by this court, that it would be a waste of time to go over the argument and repeat our views on the subject. Our latest expression of opinion, made after deliberate consideration, is found in the case of Cromwell v. County of Sac, 94 U. S. 351, 6 Cent. L. J. 209. To the reasons there adduced we have nothing to add. And we are of opinion that the second defense is also concluded by the former adjudication. The finding of the referee, upon which the judgment was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no representations as to the quantity of timber on the land sold were made to the defendant by plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding having gone into the judgment is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication.—*Mason Lumber Co. v. Buchtel.* In error to the Circuit Court of the United States for the Western Dis-

trict of Michigan. Opinion by Mr. Justice FIELD. Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

March-June, 1880.

EVIDENCE—ADMISSIBILITY OF STATEMENTS MADE BEFORE GRAND JURY IN ANOTHER CASE—COMPETENCY OF GRAND JUROR.—On the trial of an indictment found at the January term, 1879, for seduction, fornication and bastardy, the prosecutrix testified that the defendant had criminal intercourse with her on the 2d, 5th and 6th days of September, 1877, and on cross-examination swore that she was a witness before the grand jury at the January sessions, 1878, on a charge of rape made against the same defendant, and there testified that the rape was committed on the 29th of September, 1877. She was then asked whether at that hearing the foreman of the grand jury did not ask her if, prior to the date of the alleged rape, the defendant ever had criminal connection with her, and whether, in answer thereto, she did not say "No. He had frequently insisted upon it, but I had always refused him. That was the first, last and only time." She swore that she had not been asked that question, and made no such answer. With a view of discrediting her testimony and impairing her character as a witness, counsel for defendant then offered to prove by the foreman of the grand jury that the question was asked and answered as above, which offer was excluded. *Held*, to have been error. On no sound principle can it be said that a witness who has testified before a grand jury shall be permitted to claim that his evidence was a privileged communication, so that it shall not be shown under the direction of the court whenever it becomes material in the administration of justice. It is material when the evidence is necessary to protect public or private rights. A witness may be indicted for perjury for false swearing before a grand jury, and grand jurors are competent witnesses to prove what he swore before them. It is not in conflict with the oath of a grand juror to prove by him the prosecutor's previous testimony. It is material evidence of which the defendant should not be deprived unless demanded by public policy—and it is solely a question of public policy. The knowledge by a witness who is examined before a grand jury that the jurors may testify to what he has there sworn, will tend to advance the cause of truth and justice; and a wise public policy, and the rights of person and of property, require that such testimony be made competent for the purpose of contradicting and impeaching the witness at the trial of the indictment. Reversed. Opinion by GORDON, J.—*Gordon v. Commonwealth*.

ATTORNEY—HAS NO POWER TO COMPROMISE CLIENT'S CLAIM.—An attorney at law in Pennsylvania has, as such, no authority to compromise his client's claim. In Stokely v. Robinson, 10 Cal. 315, it was held that an attorney, by virtue of his professional relation, has no power to compromise his client's case without the client's authority or sanction; and this doctrine is supported by the cases of Huston v. Mitchell, 14 S. & R. 307, and Stackhouse v. O'Hara's Exrs., 2 Harris, 88. In the latter case it was said, per Coulter, J.: "An attorney at law in Pennsylvania has very extensive power in relation to conducting a suit; but after judgment this plenary power, in a great measure, ceases, excepting as to his power of receiving the amount of the judgment and giving a receipt for it." Opinion by GORDON, J.—*Housenick v. Miller*.

CONTRACT—NON-PERFORMANCE CAUSED BY ACT OF GOD NO BREACH.—C agreed with J, who owned a hotel, to supply spring water to the hotel through pipes that were laid from a spring that was the only regular source of supply since the hotel was built. J leased the hotel, agreeing with the lessee that the hotel should "be supplied with spring water during said term in the manner the same is now supplied under that certain agreement" between C and J. *Held*, that a failure of the water supply, caused by the drying up of the spring, was not a breach of the contract. Opinion by TRUNKEY, J.—*Ward v. Vance*.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

22. A mortgages certain real estate to B to secure a debt of $3,000. Subsequently A mortgages the same land to C for a like sum. B then forecloses his mortgage, and at sheriff's sale buys the land for $1,000, leaving a balance of $2,000 of his claim unsatisfied. A, within the time allowed by law, redeems the premises. Who, now, has the prior lien on the mortgaged premises, B or C? Did the sale for $1,000 extinguish the mortgage lien of B? N.
Huntington, Ind.

23. Suit brought in a justice's court on a note, defendant obtained judgment for costs; case appealed to county court; during trial plaintiff took a non-suit. Does the same operate as a dismissal of the appeal, barring plaintiff from bringing a new suit in justice's court?
La Grange, Texas. STUDENT.

24. A, wilfully, deliberately, premeditatedly, and of his malice aforethought, assaults B with a deadly weapon, and inflicts what are supposed to be mortal wounds. Yet, while B is still living, and the result of the injury not known, A is arrested, charged on affidavit with a felonious assault with intent to kill, under sec. 1262 Rev. Stat. (this being the greatest charge which can be presented while B lives.) A demands bail under sec. 1727 R. S. and sec. 24, art. II Const. Can the magistrate commit A, without bail, to await the result of B's wounds, as, if B dies, A should be held for murder in first degree, and without bail? Or can the magistrate place A's bail so high as to prevent his giving it? Can the magistrate do indirectly what he can not do directly? Or is the magistrate compelled to place A's bail at a reasonable figure, and let him escape if B should die? W. W. R.
Mayville, Mo.

25. A executed to B a mortgage on land, which was duly recorded. Afterwards A conveyed the same land to C by deed, with covenants of warranty, nothing being said about the mortgage, and C having no notice of it, further than the constructive notice of the record. B filed a bill against A to foreclose, not making C a party. A resists, and, in his defense, alleges that the execution of the mortgage was obtained by fraud, that the consideration had failed, and that the mortgage was void. The mortgage was held valid by the court, and the land sold under the decree. What rights has C now in the property? Can he now defend by showing the mortgage was originally void, that having been decided in the suit against A? Has he any other right than that of redemption? The question I am endeavoring to get at is, Did the decision against A, declaring the mortgage valid, preclude B, who was not a party to the suit, from setting up any defense, except such as may have arisen since the execution of the mortgage? B.
Fairfield, Ill.

CURRENT TOPICS.

If there is anything in the reports and text books which is not dry, or which will bear repeating, now is the time when we would be glad to find it. The courts are closed and the judges are resting. Even the legal author has gone fishing; the editor is the only man whom an unkind fate compels to remain chained to his table. But his misery is doubled because he can find so little to lay before his patrons. No grist can come to the mill; for the gleaners are absent. The last opinion was filed weeks ago. and no more can be expected for weeks yet. So the editor, with the hope that the majority of the subscribers to the CENTRAL LAW JOURNAL are taking a rest too, promises that when the courts commence to file opinions again, the JOURNAL will commence to print them. Meanwhile, if our columns are not as varied or as instructive as usual, our readers will understand the reason why.

Speaking of the pleasantries of the reports and text books, a contemporary remarks, that the metaphors which are to be found therein are at once amusing and beautiful. One such, for example, occurs in Bright v. Legerton, 2 D. F. & J. 607, where it is remarked with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed. And perhaps the observation of the Michigan judge in Farmers and Mechanics' Bank v. Kingley, 2 Doug. (Mich.) 379, is worthy to rank with these, where he says: "It would be as difficult for me to to conceive of a surety's liability continuing after the principal's obligation was discharged, as of a shadow remaining after the substance was removed." Of all text writers, Mr. Joshua Williams is, perhaps, pre-eminent in his liking for the use of metaphors. There is one, which is especially amusing, and which, as perhaps a little too pointed, he omits altogether in subsequent editions of the work in which it occurs. In a former edition of his work on Real Property he remarked, with reference to the act to render the assignment of satisfied terms unnecessary, that it was like saying that everyone should leave his umbrella at home, except that such umbrella, which shall be so left at home as aforesaid, shall afford to every person, if it should come on to rain, the same protection, as it would have afforded to him if he had it with him. And, again (Real Prop., Ed. 11, p. 460), he speaks of the present fashion of tinkering the laws of real property, preserving untouched the ancient rules, but "annually plucking off, by parliamentary enactments, the fruits which such rules must, until eradicated, necessarily produce." Last year, in the Court of Appeal, at Lincoln's Inn, in the course of a case involving the doctrine of a wife's equity to a settlement, Lord Justice Bramwell said: "There's no such thing as an equity since the Judicature Acts came into operation—is there?" Counsel ventured to suggest that it was rather law than equity which had been abolished. "It's like shot silk," observed Lord Justice James, "both colors are there, and it depends upon the light in which you look at it which color you see."

The decision of the English Master of the Rolls in the recent case of *Mayor v. Riggs*, though one of first impression, will be apt to strike the legal mind as passing strange. The question was this: Whether on a grant of land wholly surrounding a close, the implied grant or re-grant of a right of way by the grantee to the grantor to enable him to get to the reserved, or excepted, or inclosed close, is a grant of a general right of way for all purposes, or only a grant of a right of way for the purpose of the enjoyment of the reserved or excepted close in its then state. The learned judge decided in favor of the latter proposition, holding that where, at the time of the grant, the close was used for agricultural purposes, the owner and his tenants were not entitled to a right of way to the close, for the purpose of using it as building land. In deciding the point, the Master of the Rolls said: "There is, as I have said, no distinct authority on the question. It seems to me to have been laid down in very early times—and I have looked into a great number of cases, and among others several black-letter cases—that the right to a way of necessity is an exception to the ordinary rule that a man shall not derogate from his own grant, and that the man who grants the surrounding land is in very much the same position as regards the right of way to the reserved close, as if he had granted the close retaining the surrounding land. In both cases there is what is called a way of necessity; and the way of necessity, according to the old rules of pleading, must have been pleaded as a grant, or where the close is reserved, as it is here, as a re-grant. Now the question is, what is the re-grant. * * * * The object of implying the regrant, as stated by the older judges, was, that if you did not give the owner of the reserved close some right of way or other, he could neither use nor occupy the reserved close, nor derive any benefit from it. But what is the extent of the benefit he is to have? Is he entitled to say, I have reserved to myself more than that which enables me to enjoy it as it is at the time of the grant? And if that is the true rule, that he is not to have more than necessity requires, as distinguished from what convenience may require, it appears to me that the right of way must be limited to that which is necessary at the time of the grant; that is, he is supposed to take a re-grant to himself of such a right of way as will enable him to enjoy the reserved thing as it is. That appears to me to be the meaning of a right of way of necessity. If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he reserved a general right of way for all purposes; that is, as in the case I have before me, a man who reserves two acres of arable land in the middle of a large piece of land, is to be entitled to cover the reserved land with houses, and call on his grantee to allow him to make a wide metalled road up to it. I do not think that is a fair meaning of a way of necessity. I think it must be limited by the necessity at the time of the grant, and that the man who does not take the pains to secure the actual grant of a right of way for all purposes, is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided. I am afraid that I am laying down the law for the first time—that I am for the first time declaring the law; but it is a matter of necessity from which I can not escape."

NOTES.

——To trifle with an Australian court, is a serious matter. Mr. Barrister Swanwick being the defendant in an action for money had and received, the jury brought in a verdict for the plaintiff, whereupon his brother, Mr. Sydney Swanwick, was indiscreet enough to make a threatening remark to the plaintiff's counsel. The latter drew the attention of the judge to the interference, and upon examination, Mr. Sydney Swanwick was found to have upon him a loaded and capped revolver and a sheath-knife. Thereupon the judge sentenced Mr. Sydney Swanwick to imprisonment during his pleasure, and on receiving on the following day an humble apology and a request that the sentence might be remitted, informed Mr. Sydney Swanwick that he might renew his application in ten years' time.

——The Third Annual Meeting of the American Bar Association will be held at Saratoga Springs on Wednesday, Thursday and Friday, August 18th, 19th and 20th, 1880. The proceedings of Wednesday will be opened by the address of the President of the Association, Benjamin H. Bristow of New York, which will be followed by the nomination and election of officers, etc. Papers will then be read by Henry E. Young, of Charleston, S. C., on "Sunday Laws;" George Tucker Bispham, of Philadelphia, on "Rights of Material Men and Employees of Railroad Companies as against Mortgagees;" Henry D. Hyde, of Boston, on "Extradition between the States." The session of Thursday will be opened by the annual address, by Cortlandt Parker, after which the question of legal education will be discussed by the Association. The annual dinner will be given on Friday evening.

——Is identity of name evidence of identity? A correspondent writes to the *Solicitor's Journal* as follows: The learned president of the Probate, Divorce and Admiralty Division holds that identity of name is no evidence of identity. Thus, in a very recent case, in which a certificate of a marriage—a bigamous marriage—was given in evidence, he ruled, although the name of the husband mentioned in the certificate was identical with that of the respondent, and was by no means a common name, and although his profession as therein stated was the same as that of the respondent, that the certificate was no evidence that it was the respondent who was married. The petitioner fortunately was able to give evidence of the identity of the person mentioned in the certificate with the respondent, and therefore the president's ruling became immaterial in the particular case; but, as it may frequently happen that it will be difficult, or at all events, expensive, to prove identity, if identity of name is not accepted as *prima facie* evidence of it, it may be useful to refer to some of the decisions on the question. In Sewell v. Evans, 4 Q. B. 626, it was decided that in an action on a bill of exchange executed by a person bearing the defendant's name, it was not necessary to give evidence strictly identifying the person whose signature is proved with the party on whom the process has been served, unless facts appear which raise a doubt of the identity. Lord Denman said: "In cases where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were only John Smith, which is of very frequent occurrence, there might not be much ground for drawing the conclusion, but Henry Thomas Rydes are not so numerous. * * * * Lord Lyndhurst, C. B., asks why the onus of proving a negative in these cases should be thrown upon the defendant. The answer is, because the proof is so easy; he might come into court and have the witness asked whether he was the man." In Hamber v. Roberts, 7 C. B. 861, in an action by a messenger of the Court of Bankruptcy against James Roberts, for fees due from him as petitioning creditor under a *fiat*, it was held that the plaintiff proved a *prima facie* case by putting in the proceedings under the *fiat* without proving the identity of the defendant with the James Roberts named therein as the petitioning creditor. Wilde, C. J., said: "I think the evidence given on this occasion proved a *prima facie* case, and it would be productive of much mischief to give rise to a doubt by granting a rule." Lastly, in Hubbard v. Lees, L. R. 1 Ex. 255, an action of ejectment, a number of certificates of births, baptisms, marriages, and burials were produced from parish registers, and were objected to, on the ground that there was no evidence of the identity of the persons named in them with the persons of the same name who occurred in the plaintiff's line of proof. The learned judge admitted the evidence. Mr. Powell, Q.C., moved for a new trial, on the ground (amongst others) that the certificates were improperly admitted; and "the court, in granting a rule upon the other points, refused it on the objection as to the certificates, saying that the question of identity was entirely for the jury, and that they would not allow any doubt to be raised upon this point."

——It is stated that a house surgeon at an English infirmary has been unsuccessfully sued by a laborer for damages for a post-mortem examination of his wife, made without his knowledge or consent. The plaintiff admitted that he had not suffered any pecuniary loss, but alleged that "the examination had hurt his feelings," and that portions of the body had been taken away, an allegation which was denied. It is worth noticing that a very similar case arose some years ago before one of the superior courts of Cincinnati. The surgeon there contended that there was no property in a dead human body, and there could, therefore, be no legal remedy for an injury to a corpse. But the court held that, although at common law there could be no property in a corpse, yet the law gave to the husband the custody of the wife's corpse for the purpose of decent burial, and there would be a civil remedy for any interference with this right. See 10 Cent. L. J. 303, 325.——Mr. Grattan, the well known reporter of the Supreme Court of Appeals of Virginia, has retired from the position which he held so long. Ill health is the cause.——Attorney General Ward of New York has given an opinion, that telegraph poles should be assessed as real estate. He says: "These structures are articles erected upon and affixed to the land, so as to create an interest therein, and are, to the extent of the value thereof, land of the telegraph company erecting them, and, as such, liable to taxation; and it is the duty, of the assessors to assess the same as land, to the value thereof." He cites People vs. Cassity, 46 N. Y. 46, which declares that "lands" includes such an interest in real estate as will protect the erection or affixing and possession of buildings and fixtures thereon, though unaccompanied by the fee. Also 74 N. Y. 365, and 52 Barb. 105. In 19 Hun, 460, it was decided that "foundations for piers or columns placed in a public street by an elevated railroad, whether standing alone or with columns, and the superstructure thereon, are properly taxable as real estate."